THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF MBEYA
AT MBEYA
PC. CIVIL APPEAL NO. 06 OF 2020
(From the Decision of the Rungwe District Court at Tukuyu
in Civil Appeal No. 26 of 2019, Original Civil Case No. 54 of 2019
Tukuyu Urban Primary Court)

WILSON MWAKASENGA.....APPELLANT

VERSUS

ASUKILE FUNGO.....RESPONDENT

JUDGMENT

Date of the last Order: *30/09/2020*
Date of Judgment: *23/12/2020*

NDUNGURU, J.

This is a second appeal. It involves a claim of Tshs. 900,000/=. The claim originates from criminal proceedings in Tukuyu Urban Primary Court (that is Criminal Case No. 7 of 2019) where the Appellant successfully sued the Respondent for destruction of his machine-a machine used for charging car batteries contrary to section 326 of the Penal Code, Cap 16 [Revised Edition 2019].

It was alleged in the charge sheet that, the machine in question was valued at Tshs. 1,500,000/=. The record indicates that the machine was tendered in Court as exhibit A1. After full trial, the trial court was

satisfied that the charge was proved to the standard required in criminal law, convicted the Respondent and sentenced him to a conditional discharge of 12 months. In additional, the Respondent was ordered to repair the machine in question or refund current value of the machine in question. The Respondent opted to pay the Appellant Tshs. 1,500,000/= the value of the machine disclosed in the charge sheet.

Later on and upon reflection, the Respondent instituted a civil suit for recovery of Tshs. 900,000/=. The claim was based on the fact that, the current market value of the machine in question is Tshs. 2,400,000/= and that since the appellant only paid Tshs. 1,500,000/= he was obliged to pay addition amount to the tune of Tshs. 900,000/=. After a full trial, the trial court was satisfied that the claim of Tshs. 900,000/= was proved and hence ordered the respondent to pay the same. The Respondent was aggrieved and hence preferred his appeal in the District Court of Mbeya.

The appellate Court considered the appeal and was satisfied that the evidence on record did not prove the claim in question and hence quashed the trial court decision. Discontented, the appellant preferred the present appeal. His petition of appeal comprises three grounds. In the course of hearing, the appellant abandoned the second ground and remained with only the first and the third grounds.

In the first ground, the appellant challenges the first appellate court for ordering the respondent to handle over the machine to the appellant and in the third ground the appellant claims that the Appellant Court ought to have observed that the respondent failed to prove his case.

The appeal was disposed of by way of written submissions and the parties not represented complied with the fixed schedule. I will refer their submissions where a need arises.

Having given due consideration of the appeal and the submissions of the parties let me state that the appellant's submissions is a self-infliction. It is true as rightly submitted by the appellant that since the machine in question was tendered in court and marked as exhibit A1 the appellate court ought to have not ordered the respondent to handle over to him the machine which is in custody of the court. This ground has merit but not in favour of the appellant rather in favour of the Respondent. This is so because it is the duty of the appellant to claim the machine from the trial criminal court and not the respondent. That is why from outset I remarked that the appellant's submission is self-infliction.

As regards to who ought to prove the claim of Tshs. 900,000/=, the law is settled. It is the one who alleges or lodge a claim with a burden to prove the same. In civil suit, the standard is on balance of probability. In the present case and as rightly observed by the first appellate court, the mere statement that the value of the machine was Tshs. 2,400,000/= was not sufficient to prove the claim. After all, the appellant successfully lodged a charge disclosing that the machine was valued Tshs. 1,500,000/=.The record reveals that such amount was reimbursed to the appellant and thus the claim of Tshs. 900,000/=which is not supported by the evidence on record was rightly found not proved.

In his submission, the appellant contended that the respondent ought to have proved that the machine was not worth Tshs. 2,400,000/=. With due respect to the appellant and as already indicated such burden was in his shoulder and it never shifts. This position of law is underpinned under **Rule 1 (2) of the Magistrate's Court (Rules of Evidence in Primary Courts) Regulations GN. No. 66 of 1972** which clearly provides:

> *"Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim..."*

Also, the standard was articulated in **Paulina Samson Ndawavya vs. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017, Court of Appeal of Tanzania (unreported).

From the above authorities and the evidence on record, the appellant failed to prove the claim. Thus, his contention is devoid of merit.

In the upshot, the first ground has merit to the effect that the appellant court ought to have observed that the machine in question was tendered in evidence and thus not in the custody of the Respondent. Therefore, the appellant is duty bound to claim it from the trial court. The third ground lacks merit. Thus, the appeal is partly allowed to the extent explained. Each party to bear his cost in this appeal.

It is so ordered.

THE HIGH COURT OF TANZANIA

D. B. NDUNGURU
JUDGE
23/12/2020

Date: 23/12/2020

Coram: J. C. Msafiri - SRM, Ag. DR

Appellant: Absent

Respondent: Present

B/C: Mwinjuma

Court: It is for Judgment.

Respondent: I am ready for my Judgment.

Court: Judgment entered in the presence of the Respondent and in the absence of the Appellant as typed.

J. C. MSAFIRI - SRM
Ag. DEPUTY REGISTRAR
23/12/2020

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA